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No. 1

Supreme Court, U.S.  
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In The  
**Supreme Court of the United States**  
October Term, 1991

JAMES L. BARNES, JR., LEONARD GREFSENG, ROY  
R. KIMBERLY, LELLWYN B. LACKEY, WILLIE H.  
LITTLE, ELLIOTT H. MOORE, LILLIAN  
NORTHINGTON AND JOSEPH D. PATRICK,

*Petitioners,*

v.

A.S. LACY, D.C. REYNOLDS, ENERGEN BENEFITS  
COMMITTEE, ENERGEN CORPORATION, ENERGEN  
RETIREMENT INCOME PLAN, G.C. KETCHAM, G.C.  
YOUNGBLOOD, J.A. MARTIN, R.J. PATZKE, W.D.  
SELF AND ALABAMA GAS CORPORATION,

*Respondents.*

Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether a lack of deceptive intent insulates from liability an ERISA fiduciary who, according to the district court, breached its fiduciary duty to plan participants by conveying to them, verbally and in writing, information which was inaccurate and incomplete, thereby inducing detrimental reliance while serving the fiduciary's interests.

2. Whether issuance of a summary plan description ("SPD") shields an ERISA fiduciary from liability, when the fiduciary subsequently conveyed to plan participants inaccurate and incomplete information which contradicted the SPD and which, according to the district court, breached the fiduciary's duties to the participant who relied upon the subsequent information.

3. Whether the law presumes reliance by plan participants upon an ERISA fiduciary's inaccurate and incomplete information, where the information was provided as part of the fiduciary's effort to serve its own interests by provoking early retirement decisions, and where the participants reviewed the information and then agreed to retire early.

4. Whether the court of appeals violated the holding of *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), when it made dispositive factual findings that the district court did not make, and which were contrary to the district court's actual findings.

**LIST OF PARTIES**

All parties to the proceeding in the court of appeals are named in the caption.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
LIST OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	v
OPINIONS BELOW .....	2
JURISDICTION .....	2
STATUTES AND RULE INVOLVED .....	3
STATEMENT OF THE CASE .....	4
A. Introduction .....	4
B. The Facts Material to the Consideration of the Questions Presented .....	6
C. The District Court's Findings of Fact and Con- clusions of Law .....	11
D. The Court of Appeals' Decision .....	13
REASONS FOR GRANTING THE WRIT .....	14
I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS IN ITS HOLDING THAT AN ERISA FIDUCIARY WHO CONVEYS INACCURATE AND INCOMPLETE INFORMATION TO PLAN PARTICIPANTS, THEREBY INDUCING DETRIMENTAL RELIANCE WHILE SERV- ING THE FIDUCIARY'S INTERESTS, WILL ESCAPE LIABILITY IF THE FIDUCIARY DID NOT INTEND TO DECEIVE THE PAR- TICIPANTS .....	14

## TABLE OF CONTENTS – Continued

Page

II. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW REGARDING WHETHER THE ISSUANCE OF A SUMMARY PLAN DESCRIPTION ("SPD") SHIELDS AN ERISA FIDUCIARY FROM LIABILITY, WHEN THE FIDUCIARY SUBSEQUENTLY CONVEYED TO PLAN PARTICIPANTS INACCURATE AND INCOMPLETE INFORMATION WHICH CONTRADICTED THE SPD AND WHICH, ACCORDING TO THE DISTRICT COURT, BREACHED THE FIDUCIARY'S DUTIES TO THE PARTICIPANT WHO RELIED UPON THE SUBSEQUENT INFORMATION.....	20
III. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW REGARDING WHETHER THIS COURT'S DECISIONS INTERPRETING FEDERAL SECURITIES LAWS SHOULD BE APPLIED IN THE ERISA CONTEXT TO HOLD THAT THE LAW PRESUMES RELIANCE BY A PLAN PARTICIPANT UPON AN ERISA FIDUCIARY'S INACCURATE AND INCOMPLETE INFORMATION.....	22
IV. THE COURT OF APPEALS WENT BEYOND THE BOUNDARIES FOR APPELLATE COURTS ESTABLISHED BY <i>PULLMAN-STANDARD V. SWINT</i> , 456 U.S. 273 (1982), WHEN IT MADE DISPOSITIVE FACTUAL FINDINGS THAT THE DISTRICT COURT DID NOT MAKE, AND WHICH WERE CONTRARY TO THE DISTRICT COURT'S ACTUAL FINDINGS .....	26
CONCLUSION .....	29

## TABLE OF AUTHORITIES

Page

## CASES:

<i>Affiliated Ute Citizens of Utah v. United States</i> , 406 U.S. 128 (1972) .....	23, 24, 25
<i>Berlin v. Michigan Bell Tel. Co.</i> , 858 F.2d 1154 (6th Cir. 1988) .....	17, 18
<i>Eddy v. Colonial Life Ins. Co. of America</i> , 919 F.2d 747 (D.C. Cir. 1990) .....	17, 20, 21
<i>Edwards v. State Farm Mut. Auto. Ins. Co.</i> , 851 F.2d 134 (6th Cir. 1988).....	25
<i>Firestone Tire &amp; Rubber Co. v. Bruch</i> , 489 U.S. 101 (1989) .....	15
<i>Leigh v. Engel</i> , 727 F.2d 113 (7th Cir. 1984) .....	19
<i>Pilot Life Ins. Co. v. Dedeaux</i> , 481 U.S. 41 (1987) .....	16
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982) ....	26, 28
<i>Rosen v. Hotel &amp; Restaurant Employees &amp; Bartenders Union</i> , 637 F.2d 592, 600 (3d Cir. 1981).....	18
<i>Securities &amp; Exchange Comm'n v. Capital Gains Research Bureau</i> , 375 U.S. 180 (1963).....	16
<i>Shores v. Sklar</i> , 647 F.2d 462 (5th Cir. May, 1981).....	24
<i>Stahl v. Tony's Bldg. Materials, Inc.</i> , 875 F.2d 1404 (9th Cir. 1989).....	18

## STATUTES AND RULE:

28 U.S.C. § 1254(1) .....	2
Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1) .....	3
Section 104(b)(1) of ERISA, 29 U.S.C. § 1024(b)(1) ..	4, 22

## TABLE OF AUTHORITIES - Continued

Page

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)	
.....	3, 15, 21
Fed. R. Civ. P. 52(a) .....	4, 28

## OTHER:

1974 U.S. Code Cong. & Admin. News 4639, 4649 ....	15
H.R. Rep. No. 93-533 (1973) .....	15

No. \_\_\_\_\_

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**Petition For A Writ Of Certiorari  
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**PETITION FOR WRIT OF CERTIORARI**  
— ♦ —

James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Lellwyn B. Lackey, Willie H. Little, Elliott H. Moore, Lillian Northington and Joseph D. Patrick hereby petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit, enabling this Court to review the judgment in *James L. Barnes, Jr., Leonard Grefseng, Roy R. Kimberly, Lellwyn B. Lacey (sic), Willie H.*

*Little, Elliott H. Moore, Lillian Northington and Joseph D. Patrick, Plaintiffs, v. A.S. Lacy, D.C. Reynolds, Energen Benefits Committee, Energen Corporation, Energen Retirement Income Plan, G.C. Ketcham, G.C. Youngblood, J.A. Martin, R.J. Patzke, W.D. Self and Alabama Gas Corporation, Defendants*, 927 F.2d 539, entered on March 22, 1991.

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### OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 927 F.2d 539 and is reprinted in the separate appendix hereto. (A-1).<sup>1</sup> A transcript of the district court's unreported findings of fact and conclusions of law is reprinted in the appendix hereto. (A-12). A transcript of the district court's unreported final judgment hearing, including findings and conclusions, is reprinted in the appendix hereto. (A-28).

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### JURISDICTION

The court of appeals entered judgment on March 22, 1991. (A-1). Petitioners timely filed a petition for rehearing, which was denied on May 9, 1991. (A-35). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

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<sup>1</sup> References to page numbers in the appendix hereto appear as (A-\_\_\_).

**STATUTES AND RULE INVOLVED**

Section 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1), provides in pertinent part as follows:

(1) . . . [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and -

. . .

(B) With the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

. . .

Section 102(a)(1) of ERISA, 29 U.S.C. § 1022(a)(1), provides as follows:

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in § 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with § 1024(b)(1) of this title.

Section 104(b)(1) of ERISA, 29 U.S.C. § 1024(b)(1) provides in pertinent part as follows:

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in § 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in § 1022 of this title every tenth year after the plan becomes subject to this part.

. . .

Fed. R. Civ. P. 52(a) provides in pertinent part as follows:

. . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. . . .



## STATEMENT OF THE CASE

### A. Introduction.

The district court, Judge Sam C. Pointer, found that an employer, Alabama Gas Corporation (hereinafter "Alagasco"), had voluntarily undertaken a responsibility to act as an ERISA fiduciary in communicating with its

employees, who were pension plan participants, about an early retirement program for which they were eligible. The court found that Alagasco had then breached that duty by conveying inaccurate and incomplete information to them, including all petitioners. (A-17-19). The district court cited Alagasco's written warning that the eligible employees should "keep in mind, however, that this is a one-time offer," a warning which was delivered while the employees were deciding during the three week "window" whether to retire under the program. The district court also found that this "one-time offer" representation was repeated verbally, and cited circumstances which "could and should have alerted the Company that [the eligible employees] would want to know the possibility of such an offer . . . being offered at a later date." (A-16-17). Two years after petitioners retired under the program, Alagasco offered a second and more attractive early retirement program to, among others, all employees who had declined enrollment in the first program.

The district court found that Petitioner Barnes had prevailed on his ERISA fiduciary claim because he had been wrongfully induced by the inaccurate and incomplete information to retire under Alagasco's first early retirement program. (A-20-21). The district court found that the other petitioners had not proved their reliance upon Alagasco's breach, rejecting their claim that reliance should be presumed in the circumstances in which the wrong information was given. (A-21-23).

The court of appeals reversed the district court's verdict in favor of Petitioner Barnes, and affirmed the dismissal of the other petitioners' claims, pointing out that Alagasco had acted in good faith because it did not

specifically intend to offer a second program at the time the "one-time offer" representations were made. (A-8, 10-11). In holding that Alagasco had not breached any ERISA fiduciary duties, the court of appeals also relied upon its own fact-finding, which directly contradicted facts found by the district court. The court of appeals relied upon, and attributed to the district court, a finding that "Alagasco had told its employees the truth about [the program]." (A-8, 10). The district court had *not* made any such finding, but had specifically found that Petitioner Barnes would not have retired "if he had been told the truth of the matter, the full truth. . . ." (A-21).

The court of appeals also concluded that because a summary plan description, issued two years prior to the first early retirement program, noted Alagasco's discretion to amend the plan, petitioners had been constructively placed on notice that Alagasco retained the right to offer a second program. (A-8-9). This "finding" by the court below also contravened the district court's findings, as we demonstrate specifically in Section IV of this petition.

#### **B. The Facts Material to the Consideration of the Questions Presented.**

In 1985, Alagasco decided to implement an early retirement program. It is agreed that two goals motivated this decision. First, Alagasco wanted to effect a long-term savings in its payroll and benefit costs. (R3-152). The program accomplished this purpose; the estimated payroll and benefit savings to Alagasco for fiscal year 1986 alone was \$862,000.00 (R3-153). Second, Alagasco wanted to "restructure" its salaried workforce. (*Id.*) Alagasco's

president stated that he wanted to achieve these two goals at no cost to the company. (R4-298-300). To avoid spending its own money, Alagasco drew the program's benefits directly from the pension plan. (R4-326-327). Under the accounting and other rules governing employee pension benefit plans, Alagasco was able to do this without establishing any additional liability or expense with respect to the program. (P. Ex. 49, p. 2; R3-158-159).

Alagasco's officers testified that they wanted eligible employees to retire under the program. (R3-154-155 and 198; R4-302). Realizing that the manner in which the program was presented might affect the number who accepted it, David Self, the Alagasco Vice President in charge of designing and presenting the program, set about the task of scripting the program's presentation. (R3-198-199). It is undisputed that Vice President Self repeatedly instructed the officers who were to present the program that they should stress the "one-time" nature of the program, as well as the fact that the company "[f]ully anticipate[s] overwhelming acceptance." These instructions were stressed again and again, both verbally and in writing. (P. Ex. 22, 23 and 25; R3-178-180, 185-186).

With this script in place, Alagasco presented the program to the eligible employees. Mr. Self agreed that his earlier emphasis on the one-time nature of the program was consistent with the way the program was actually presented. (R3-186). At one of the first group meetings held to present the program, Mr. Self recalled that an employee asked what would happen if Alagasco did not attract enough acceptances: "Do you think you'll come

back and sweeten the pot?" The response of the Alagasco spokesperson was an unequivocal "No." (R3-171, 190).

Having heard this colloquy, Mr. Self then delivered to all eligible participants a letter formally announcing the program and warning them to "[p]lease keep in mind, however, that this is a one-time offer." (P. Ex. 1; R3-170-172). In using this language, it is undisputed that Alagasco intended to let the eligible employees know that the company was not going to come back and offer another enhanced window program if too few people retired under this one. (R3-155, 171).

At the subsequent meetings held by Alagasco to explain the program, the "one-time offer" representation was repeated on several occasions. (R3-7, 29, 42-43, 58, 100, 105, 129-130, 196-197, and 227).

Alagasco's president stated that throughout the process of presenting the program to the eligible employees, the company never intended to relinquish any of its corporate power to offer another early retirement program at any time. (R4-322-323). In fact, Vice President Self agreed that Alagasco intended to retain the discretion to announce, at any time it pleased, a second offer to the employees who turned down the first one. (R3-189). It is undisputed that these intentions were never revealed to the eligible employees, with the sole exception of those employees who were present at one departmental meeting during which an Alagasco officer indicated that the company would "never say never" regarding the possibility for a second opportunity. None of the petitioners attended this meeting. (R3-67-68, 77, 189-190; R4-323).

In several respects, Alagasco's communications about this matter departed from usual company procedure. Most significantly, it is agreed that the plan administrator had no involvement in presenting the program to the eligible employees, even though the plan document assigned to the plan administrator alone the role of preparing and distributing information to employees about the plan. (R4-248; P. Ex. 31, pp. 7-3 and 7-4). Contrary to this assignment, Alagasco handled all communications to eligible employees regarding the early retirement program. (R3-186-188; R4-243-244, 248 and 251). In another departure from normal procedure, the original draft of the letter to the participants, which was authored by Alagasco's chief benefits specialist and which contained no representation about future offers, was altered by Vice President Self to add the "one-time offer" language. (P. Ex. 20; R4-239). Ordinarily, but not in this case, Alagasco even secured the services of outside consulting firms to help draft communications to participants. (R4-246, 284-285; P. Ex. 18).

All of the written and verbal communications described above occurred within the three week period which ended on Friday, December 6, 1985, the date by which eligible employees were required to decide whether to retire under the program. (P. Ex. 1; R3-186). A consultant who testified for Alagasco at trial had previously informed Alagasco that the window period for accepting similar programs was generally from "two months to one year"; he testified at trial that the three week window used in this instance "would be about as short as I have seen." (P. Exs. 18 and 47, pp. 39, 55).

Under this deadline, each of the petitioners decided to retire pursuant to the program. Each of them denied any intention or thought of retiring at the time Alagasco approached them with the program. (R3-4, 5, 25, 26, 36, 42, 47, 57-59, 63, 95, 102-103, 111-114, and 124). Each of them read the written "one-time offer" representation and heard the verbal representations to that effect before deciding to retire. (R3-9-12, 16, 29-31, 42-44, 46-47, 61-63, 96-98, 105-106, 114-117, and 160). All petitioners also testified that they would not have retired at that time had Alagasco told them that the company might, if it wished, offer them a second chance if they turned down this program. *Id.*

Two years after telling petitioners that the early retirement program under which they retired would be a one-time offer, Alagasco implemented a second early retirement program. It is agreed that this second program was richer from the employee's perspective than the first had been, and that it was offered to a group of employees which included all of the employees who had decided to wait when offered the first program. (R4-268, 296; R3-199, 233). The "one-time offer" representations that had been made during the presentation of the first program were absent from any of the presentation materials used in connection with the second program. (R3-173-174).

When petitioners learned that the company had offered a second early retirement window to those who had waited, they complained in writing to Alagasco's president, reminding him that they had left their jobs on the express representation that they would not have another chance at early retirement. (P. Ex. 3). Alagasco

refused to consider their complaint, and this suit followed. (P. Ex. 4; R3-107; R4-314-316).

**C. The District Court's Findings of Fact and Conclusions of Law.**

The district court found that Alagasco had two objectives in implementing the first early retirement program: "First, a cost reduction; and second, making the salary force a little bit more lean in order to accomplish certain general reorganizations and restructure of those responsibilities." (A-15). The court found that at one of the first meetings held to announce the program, Alagasco fielded a question from an employee about whether this offer would be made available again in the future. (A-16). The court found that Alagasco answered this question by informing the group that the program was a one-time offer, "that one should not fail to take advantage of it in anticipation that the company would be making better offers at any later time, and that there was no target number of persons whom the company desired to accept the program." (A-16-17).

The court further found that this question could and should have alerted Alagasco "to the potential that employees would want to know the possibility of such an offer for enhanced benefits on early retirement being offered at a later date." (A-17). The court concluded that "[i]n its prepared materials, however, the company did not - as it should have - indicate to the employees that although there were no plans for any later offers and none were contemplated, that the company, of course, retained the right to consider and make offers at a later

time, including offers to the very individuals to whom this offer was being made." *Id.* The court found that the company failed to provide this information, and instead, persisted in describing the program as a "one-time offer." *Id.*

The district court defined Alagasco's fiduciary responsibility<sup>2</sup> in these circumstances as ensuring "that the information given was accurate and full and not misleading." (A-18). The court found that Alagasco had breached this duty by failing to inform the eligible employees, including all petitioners here, that the phrase "one-time offer" applied only to the precise window dates for the program, and that the company would retain the right "to consider and make future similar offers." *Id.*

The district court described Alagasco's communications as "misleading" and as less than "the truth of the matter, the full truth. . . ." (A-21, 25). In the final judgment hearing, the district court characterized Alagasco's information as "misrepresented matter." (A-32).

The district court then assigned to the plaintiffs the burden of establishing that they would have made different choices had the company provided them with accurate and full information on this subject. (A-19-20). The court found that all of them except Petitioner Barnes had failed to carry this burden, acknowledging that in making this distinction, it was "cutting a fine line." (A-20-23).

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<sup>2</sup> As the court of appeals noted, Alagasco dropped any contention that it bore no ERISA fiduciary duties in its role of presenting the first early retirement program to petitioners.

Subsequently, the district court held a hearing to determine the appropriate remedies for Mr. Barnes, and entered final judgment awarding him \$93,664.28 and dismissing the claims of all other petitioners. (A-29, 33).

#### **D. The Court of Appeals' Decision.**

The court below, while professing to find no error in the district court's factual findings, made its own findings of fact and then relied upon them to reverse the district court's judgment against Alagasco for breaching its fiduciary duty. (A-2, 7-8, 10-11). For example,<sup>3</sup> where the district court had specifically found that Alagasco was guilty of failing to tell "the truth of the matter, the full truth," the court of appeals incorrectly attributed to the district court a finding that "Alagasco had told its employees the truth about [the first early retirement program]." (A-8, 21).

In addition, the court of appeals searched the record to determine that some evidence suggested that petitioners "might be said to have constructive knowledge" of the summary plan description's clause noting the plan sponsor's discretion to amend the plan. (A-8-9). The district court had not commented upon the effect of this summary plan description, which was issued two years prior to the verbal and written representations on which the district court premised its findings of fact. (P. Ex. 32).

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<sup>3</sup> In Section IV of this petition, the independent and incorrect "findings" by the court below are exhaustively contrasted with the actual findings of the district court.

In addition to these incorrect "findings", the court of appeals relied upon the district court's actual findings that Alagasco had not intended to deceive the eligible employees and had not intended or contemplated the announcement of a second early retirement program during the window period for the first program. (A-10-11).

The court of appeals also addressed the district court's finding that none of the petitioners except Mr. Barnes had proved reliance upon the faulty information. (A-7, n. 1). Even though this issue should not have been reached in light of the appeals court's finding that no breach had occurred, the court specifically held that the district court's reliance finding did not constitute clear error. *Id.* The court did not address petitioners' contention that reliance should have been presumed in the circumstances.

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#### REASONS FOR GRANTING THE WRIT

- I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS IN ITS HOLDING THAT AN ERISA FIDUCIARY WHO CONVEYS INACCURATE AND INCOMPLETE INFORMATION TO PLAN PARTICIPANTS, THEREBY INDUCING DETRIMENTAL RELIANCE WHILE SERVING THE FIDUCIARY'S INTERESTS, WILL ESCAPE LIABILITY IF THE FIDUCIARY DID NOT INTEND TO DECEIVE THE PARTICIPANTS.

The court below placed dispositive weight upon the fact that Alagasco did not intend to mislead the eligible employees about the possibility for a second early retirement opportunity, and did not, in fact, contemplate or

intend to offer a second early retirement program. (A-8, 10). The court of appeals determined that Alagasco's communications could not be characterized, therefore, as material misrepresentations; on that basis, the court rejected the district court's conclusion that Alagasco had breached its ERISA fiduciary duties by providing inaccurate and incomplete information. (A-10-11).

The Eleventh Circuit's approach conflicts directly with that of other circuits. The controversy concerns whether ERISA fiduciary claims should be governed by principles this Court has developed to assess fiduciary conduct in another federally regulated field. Because the issue strongly affects ERISA fiduciaries' accountability to plan participants for issuing faulty and harmful communications, this conflict among the circuits merits the Court's attention.

ERISA's fiduciary provisions include the general requirements, applied here by the district court, that fiduciaries must serve their participants and beneficiaries "[w]ith the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." 29 U.S.C. § 1104(a)(1). This Court has emphasized that these standards "codif[y] and made [] applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, \_\_\_, 109 S. Ct. 948, 954 (1989) (citing *H.R. Rep. No. 93-533*, p. 11 (1973), *U.S. Code Cong. & Admin. News* 1974, pp. 4639, 4649). To ensure the full realization of this policy, the Court directed that "courts are to develop a federal common law of rights

and obligations under ERISA-regulated plans." *Id.*, 109 S. Ct. at 954 (citing *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 56 (1987)).

These teachings do not mark the first time this Court has recognized the need to adapt special rules from trust law to enforce fiduciary duties imposed by federal statute. In the context of federal securities laws, the Court has emphasized the distinction between a party dealing with another at arms' length, and a fiduciary advising its beneficiary:

Nor is it necessary in a suit against a fiduciary, which Congress recognized the investment advisor to be, to establish all the elements required in a suit against a party to an arms' length transaction. Courts have imposed on a fiduciary an affirmative duty of "utmost good faith, and full and fair disclosure of all material facts," as well as an affirmative obligation "to employ reasonable care to avoid misleading" his clients. There has also been a growing recognition by common-law courts that the doctrines of fraud and deceit which were developed around transactions involving land and other tangible items of wealth are ill-suited to the sale of such intangibles as advice and securities, and that, accordingly, the doctrines must be adapted to the merchandise in issue.

*Securities & Exchange Comm'n v. Capital Gains Research Bureau*, 375 U.S. 180, 194 (1963). The Court refused to assume that Congress was ignorant of this evolution in the common law of fraud when it enacted legislation to prevent fraudulent practices by investment advisors. *Id.* at 195.

In contrast to the court below, other courts of appeals have not hesitated to reflect in their ERISA decisions this recognized need to hold fiduciaries to strict standards of diligence when they communicate with their beneficiaries. The D.C. Circuit, addressing a situation in which the ERISA fiduciary had told the literal truth, nevertheless found that the fiduciary had breached its ERISA duties by failing to discharge its "affirmative obligation to *inform* - to provide complete and correct material information on [the participant's] status and options." *Eddy v. Colonial Life Ins. Co. of America*, 919 F.2d 747, 751 (D.C. Cir. 1990). The D.C. Circuit pointed out that this affirmative duty to inform is stricter than the duty to refrain from "imparting misinformation." *Id.* The Eleventh Circuit in the decision below declined to impose this higher standard, choosing instead to measure Alagasco's conduct only against the duty to avoid making an intentional misrepresentation. (A-10-11).

The Eleventh Circuit's emphasis on Alagasco's lack of deceptive intent also places its decision in conflict with the Sixth Circuit's approach in *Berlin v. Michigan Bell Tele. Co.*, 858 F.2d 1154 (6th Cir. 1988). There, the court held that "the plan fiduciary [] had a fiduciary duty not to make misrepresentations, either negligently or intentionally, to potential plan participants concerning the second offering." *Id.* at 1163-64.<sup>4</sup> In determining that

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<sup>4</sup> The court below alluded to the *Berlin* court's holding that the ERISA fiduciary could be held liable only if a second early retirement program was being seriously considered at the time management denied that such was the case. This holding, contrary to the Eleventh Circuit's suggestion, cannot be

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negligent misrepresentations can constitute a breach of an ERISA fiduciary's duties to participants, the Sixth Circuit in effect held that good faith or a lack of deceptive intent would not shield a fiduciary from accountability.

The Third Circuit has agreed with the D.C. Circuit in holding that ERISA fiduciaries bear affirmative duties to inform. *Rosen v. Hotel & Restaurant Employees & Bartenders Union*, 637 F.2d 592, 600 (3d Cir. 1981). There, a fiduciary was held to have breached its duties in failing to inform pensioners of their employer's failure to make scheduled contributions to the fund. *Id.* But cf. *Stahl v. Tony's Bldg. Materials, Inc.*, 875 F.2d 1404 (9th Cir. 1989) (Fiduciary bore no duty to inform participant of specific ways by

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applied in the absence of peculiar facts present in *Berlin*: There, the first retirement window had already closed when management was accused of making misrepresentations about whether a second offering might occur. Employees had begun to delay their normal retirement decisions in hopes of a future early retirement offer. This was causing a distortion in the normal pattern of retirements, and management only then began to represent that the first offering had been a one-time application and that managers considering retirement should not delay their normal plans. *Id.* at 1158. In this context, it would have been unfair to find that the employer had engaged in misrepresentations until it actually began considering a second plan. Thus, the *Berlin* court announced its precisely tailored holding on this point, which has no relevance here, where none of petitioners were considering "normal retirement" at the time Alagasco approached them about the first early retirement program. Moreover, unlike in *Berlin*, the ERISA fiduciary here stated *during the first window period* that the early retirement program would be a "one time offer" and that the company would not later "sweeten the pot" if too few employees retired. (R. 3-171, 190; P. Ex. 1; A-16-17).

which clear warning in summary plan description could apply to him).

While the decisions of the court below and of the D.C., Third and Sixth Circuits involved the ERISA fiduciary duties of care, skill, prudence and diligence, the Seventh Circuit, addressing the related ERISA fiduciary duty of loyalty, has held that "[g]ood faith is not a defense." *Leigh v. Engel*, 727 F.2d 113, 124 (7th Cir. 1984). While breach of the loyalty duty carries the implication that some measure of bad faith accompanied the fiduciary's conduct, the Seventh Circuit's flat refusal to consider good faith as a defense suggests that a fiduciary in breach of the duties of care, skill, prudence and diligence, would face a materially stricter standard in that venue than in the Eleventh Circuit.

Millions of employees rely upon their pension plan fiduciaries to provide them with information that is accurate and complete regarding their retirement benefits and options. Because the standard of care to which such fiduciaries are held will often be dispositive of claims brought by aggrieved participants, this Court should grant certiorari to resolve this conflict among the circuits.

**II. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW REGARDING WHETHER THE ISSUANCE OF A SUMMARY PLAN DESCRIPTION ("SPD") SHIELDS AN ERISA FIDUCIARY FROM LIABILITY, WHEN THE FIDUCIARY SUBSEQUENTLY CONVEYED TO PLAN PARTICIPANTS INACCURATE AND INCOMPLETE INFORMATION WHICH CONTRADICTED THE SPD AND WHICH, ACCORDING TO THE DISTRICT COURT, BREACHED THE FIDUCIARY'S DUTIES TO THE PARTICIPANT WHO RELIED UPON THE SUBSEQUENT INFORMATION.**

A centerpiece of the Congressional effort to promote full disclosure to pension plan participants, ERISA's summary plan description provisions have been turned against plan participants by the decision below. This misapplication of ERISA's reporting and disclosure requirements undermines the very purpose of the statute and warrants this Court's attention. Moreover, the Eleventh Circuit's decision on this point again brings it into conflict with the D.C. Circuit's *Eddy* decision, as we demonstrate below.

Faced with the district court's finding that an Alagasco had induced a participant to retire by providing inaccurate and incomplete information about an early retirement program, the court below has determined that Alagasco cannot be held liable for breaching its ERISA fiduciary duties because the plan administrator had, two years earlier, provided the participants with a summary plan description ("SPD") which "might be said to have [given them] constructive knowledge" of the correct information.<sup>5</sup> (A-8-9). Specifically, the court of appeals

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<sup>5</sup> As we explain in Section IV herein, *only* the appeals court made factual findings about this matter.

determined that the SPD's statement that Alagasco could amend the plan constructively cured any confusion caused two years later, when Alagasco assured petitioners that the early retirement program was a "one-time offer" and that the company would not later "sweeten the pot" if too few employees retired. (A-8-9, 16-18; R3-171, 190).

No statutory or decisional basis exists for the Eleventh Circuit's novel use of a summary plan description ("SPD") to shield a fiduciary who, after issuance of the SPD, provides plan participants with additional, written information which contradicts the SPD and which would otherwise support a judgment against the fiduciary for breach of its statutory duties. The court below has created a defense which cannot be reconciled with ERISA's purpose or structure.

ERISA's fiduciary provisions clearly impose standards that apply to communications independently of the technical requirements governing summary plan descriptions.<sup>6</sup> As the D.C. Circuit has stated, "[a] fiduciary's duty . . . is not discharged simply by the issuance and dissemination of the [] documents and notices [required by ERISA's reporting and disclosure provisions]." *Eddy*, 919 F.2d at 750. ERISA's structure supports this view. Fiduciaries are required to discharge all of their duties with the "care, skill, prudence, and diligence" appropriate to the circumstances. 29 U.S.C. § 1104(a)(1). Nothing suggests that a fiduciary will be deemed, as a matter of law, to have fulfilled these fiduciary duties merely by complying with technical provisions governing

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<sup>6</sup> As the court below noted, Alagasco does not contest the application of ERISA's fiduciary standards to its communications with employees regarding the early retirement program. (A-4).

summary plan descriptions. Summary plan descriptions are required to be disseminated only once per decade, or twice if material changes have occurred during a five year period. 29 U.S.C. § 1024(b)(1).

The summary plan description on which the court below premised its decision was distributed two years prior to the announcement of the first early retirement program. (P. Ex. 32). The documents which contained the "one-time offer" representation comprised the sole written explanation regarding the first early retirement program. (P. Ex. 1; R4-238; See also R3-170, 175-176, 186-187 and 213-214). Yet the court below held that the inaccurate and incomplete information contained in that document was somehow cured by a provision in the previously issued summary plan description. This paradoxical holding demonstrates strikingly why this Court should determine whether compliance with ERISA's technical reporting and disclosure provisions excuses a fiduciary's subsequent issuance of other misleading communications to participants.

**III. THE DECISION BELOW PRESENTS AN IMPORTANT AND UNSETTLED QUESTION OF FEDERAL LAW: WHETHER THIS COURT'S DECISIONS INTERPRETING FEDERAL SECURITIES LAWS SHOULD BE APPLIED IN THE ERISA CONTEXT TO HOLD THAT THE LAW PRESUMES RELIANCE BY A PLAN PARTICIPANT UPON AN ERISA FIDUCIARY'S INACCURATE AND INCOMPLETE INFORMATION.**

The court below rejected without comment the argument (advanced by all petitioners except Mr. Barnes) that the district court erred in failing to presume that they had

relied upon Alagasco's inaccurate and incomplete information by retiring under the first early retirement program.<sup>7</sup> To serve policies recognized by this Court in construing federal securities laws, courts presume reliance when stockbrokers fail to disclose information in breach of their statutory duties. Because reliance upon an omission is extraordinarily difficult to prove, whether this presumption should apply in the ERISA context is an issue which likely affects the outcome of many claims by ERISA participants and is thus worthy of consideration by this Court.

The Court has taught that when a stockbroker is guilty of a misleading omission to a client, it is not a condition of recovery under federal securities law that the client prove detrimental reliance upon the omission. This rule was adopted in *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128 (1972):

We conclude, however, that the Court of Appeals erred when it held that there was no violation of the Rule unless the record disclosed evidence of reliance on material fact misrepresentations by [the securities buyers]. [citations omitted]. We do not read Rule 10b-5 so restrictively.

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<sup>7</sup> The court below agreed in a footnote with the district court's finding that none of these seven had proved reliance upon the inaccurate and incomplete information. (A-6-7, n. 1). Because the court of appeals found that Alagasco had committed no fiduciary breach, it is quite arguable that its affirmance of the district court regarding these petitioners' reliance is nothing but dictum. However, in the event the court of appeals is deemed to have established the law of the case on this point, petitioners raise this matter now.

. . .

Under the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision. [citations omitted]. This obligation to disclose and this withholding of a material fact establish the requisite element of causation and fact. [citations omitted].

*Id.* at 152-154.

The former Fifth Circuit interpreted *Affiliated Ute* as allowing the trier of fact to presume reliance where securities plaintiffs could justifiably expect that the defendants would disclose material information. *Shores v. Sklar*, 647 F.2d 462, 468 (5th Cir. May, 1981) (en banc). According to the *Shores* opinion, this Court created the presumption "[b]ecause reliance is so difficult to prove when a defendant has failed to disclose a material fact rather than misrepresenting it." *Id.* Even the dissenters in *Shores* recognized that "a plaintiff faces almost an insurmountable burden if he is required to present affirmative evidence that he relied specifically on the defendants' silence with regard to a material fact. *Id.* at 475.

This Court should determine whether such a presumption applies where an ERISA fiduciary is found to have conveyed incomplete and inaccurate information to a plan participant. The Congressional purpose manifest in Rule 10b-5 also animates ERISA's fiduciary provisions. Just as Rule 10b-5 proscribes the omission of material facts to securities purchasers, ERISA prohibits fiduciaries

like Alagasco from omitting material facts when communicating the terms of employee benefit plans to participants and beneficiaries. The duty owed by an ERISA fiduciary to its participant is no less grave than that owed by a stockbroker to an investor. Similarly, an ERISA participant is in no better a position to prove that she retired in reliance upon a material omission, than a securities purchaser who must prove that she made a substantial investment in reliance upon such an omission.

*Affiliated Ute* and its progeny stand for a general proposition which fully comports with ERISA's protective purpose: When a statute commands disclosure of a fact which would be material to a reasonable person, the party who breaches the statute will not escape liability merely because the person to whom the facts should have been disclosed, cannot *prove* reliance upon the omission. In this circumstance, courts need not abandon the element of reliance; under *Affiliated Ute*, courts can presume reliance and place the burden upon the party breaching the statute to demonstrate that the claimant did *not* rely upon the omission.

For these reasons, the Eleventh Circuit's refusal to presume reliance merits this Court's attention. The Sixth Circuit, without citing *Affiliated Ute*, has held that an ERISA claimant would not be required to prove that he detrimentally relied upon a misleading summary plan description, on the basis that "Congress has promulgated clear directives prohibiting misleading summary descriptions," a purpose which the court determined would be undermined if courts imposed the "technical requirement" that an employee must prove detrimental reliance. *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 137

(6th Cir. 1988). In so holding, the Sixth Circuit has suggested that the Eleventh Circuit's approach may not be shared by other circuits facing this problem. Instruction from this Court would thus provide needed direction.

**IV. THE COURT OF APPEALS WENT BEYOND THE BOUNDARIES FOR APPELLATE COURTS ESTABLISHED BY *PULLMAN-STANDARD V. SWINT*, 456 U.S. 273 (1982) WHEN IT MADE DISPOSITIVE FACTUAL FINDINGS THAT THE DISTRICT COURT DID NOT MAKE, AND WHICH WERE CONTRARY TO THE DISTRICT COURT'S ACTUAL FINDINGS.**

In two respects, the court below engaged in the sort of independent fact-finding that this Court forbade in *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). There, the Eleventh Circuit was found to have erred when it "made its own determination" of the legal effect of evidence it believed had been ignored by the district court. *Id.* at 292. This Court reminded the Eleventh Circuit of the "elementary" doctrine that when an appellate court "discerns that a district court has failed to make a finding because of an erroneous view of the law," or that "findings are infirm because of an erroneous view of the law," the only appropriate action is remand for further proceedings "unless the record permits only one resolution of the factual issue." *Id.* at 291-92. Here, the Eleventh Circuit has again failed to abide by this teaching.

First, the court below, while expressly declining to find error in any of the district court's factual findings, (A-2, 7), went on to mistakenly (and explicitly) attribute findings to the district court that the district court did not

make. The court of appeals stated that the district court found that "Alagasco had told its employees the truth about [the first early retirement program]" and that "Alagasco made no untruthful statements." (A-8, 10).

The district court made no such findings. In fact, District Judge Pointer's actual findings contain the following statement: "I conclude that in [Mr. Barnes'] particular situation, he would not have made the choice under VERO if he had been told the truth of the matter, the full truth - namely, the company was not foreclosing that option if matters should change." (A-21). The district court also found the following fact: "As to Mr. James Barnes, I conclude that he did rely on the misinformation and would not have made the choice of early retirement if it had been made clear that "never say never"; that is, that the company was not foreclosing the possibility of making another offer to the very same group of individuals at a later date." (A-20). Later, after announcing the verdict in Mr. Barnes' favor, the district court responded to defense counsel's question as follows: "Well, my view is that the company must bear responsibility for the decisions that in fact were made, to the extent they were in fact induced by misleading information." (A-25).

In view of these district court findings, it is clear that the court below erred in attributing to the district court the findings that "Alagasco had told its employees the truth about VERO" and that "Alagasco made no untruthful statements." (A-8, 10).

Second, the court below searched the record to find - and then rely upon - some evidence it interpreted as

indicating that petitioners "might be said to have constructive knowledge" of the summary plan description's clause noting the plan sponsor's discretion to amend the plan. (A-8-9). The district court had made no findings or comments about the summary plan description, which predated by two years the verbal and written misinformation on which the district court premised its findings of fact. (A-12-27; P. Ex. 32). In these circumstances, the court of appeals was empowered, at most, to hold that the district court had failed to consider relevant evidence, thus warranting a remand to the district court for this purpose.

By finding and relying upon facts that the district court did not find, and which were actually contrary to the district court's findings, and by searching the record to find and rely upon a provision in the summary plan description on which the district court had not commented, the court below failed to abide by Fed. R. Civ. P. 52(a), as strongly enforced by this Court in *Pullman-Standard*. Therefore, this Court should exercise its supervisory power to instruct the Eleventh Circuit to revisit its opinion and judgment without overstepping the proper bounds of appellate jurisprudence.

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## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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